

Debra Sandler - Direct (Zalesin)

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1 BY MR. ZALESIN:

2 Q. Can you tell us what that is, ma'am?

3 A. Yeah.

4 This is the Equal box -- this one is in Spanish, so I
5 am assuming this is the local product -- characterized by a
6 blue box, blue packet with a sort of large, yummy-looking
7 strawberry and sprinkles falling onto it. And it says here,
8 "Sweet like sugar. Sweet as sugar."

9 Q. And let me also show you Plaintiffs' Exhibits 25 and
10 25(a).

11 What is that?

12 A. And this is the Equal packet, the blue Equal packet
13 with the strawberry that is located inside of the Equal, the
14 blue Equal box. And it says here -- again, it shows the --
15 it's a blue packet with blue type, and it's got the
16 strawberry with the stars falling down on it.

17 Q. Okay.

18 And are these various trade dresses, the pink Sweet'N
19 Low and the blue Equal, well-known to consumers?

20 A. Widely known. I think if you ask certainly anyone in
21 the category, they typically identified as the pink and the
22 blue, pink being Sweet'N Low and blue being Equal.

23 Q. Okay, now let's talk about Splenda and its trade
24 dress.

25 I think you said you were involved in the launch of

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1 Splenda. Were you involved in the choice of package design
2 for Splenda?

3 A. Yes, I was.

4 Q. Tell me a little bit about -- actually, tell the Judge
5 a little bit about McNeil's thinking and what factors went
6 into the selection of a trade dress for Splenda.

7 A. Well, as I said, I joined Johnson & Johnson in about
8 1999. I think I said '98, but it was really '99 -- going
9 back to my daughter's birth, it was 1999 -- and proceeded to
10 work on the launch of Splenda.

11 What we did, quite honestly, is we talked to consumers
12 about -- we looked at a wide variety of package designs and
13 approaches, and we rested with this particular box
14 (indicating). We thought it was aesthetically pleasing to
15 the consumer.

16 Q. Now, did you have as one of your objectives to
17 distinguish or did you want to look similar to these other
18 brands and did you take these other brands into account when
19 you launched Splenda?

20 A. What we took into account was that those were the
21 market leaders at the time. The market was divided almost
22 50-50 -- well, Equal was actually the dollar -- the dominant
23 dollar leader, whereas Sweet'N Low was the leading unit
24 sales, because it was lower priced. But those were the
25 largest forms in the category.

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1 And what we took into account was that these two were
2 distinctive and we wanted a distinctive look from these as
3 well.

4 As I said before, consumers sort of generally said,
5 "Hey, the pink and the blue." We did not want to be either
6 pink or blue, because that's clearly when consumers go into
7 a retail -- a restaurant or something and they sort of look
8 at the colors and the know which is which.

9 Q. I think we all know by this point that the color of
10 the Splenda box is a light or pastel yellow. How did you
11 pick that?

12 A. We tested a wide variety. We looked at purple, we
13 looked at green, we looked at a whole host.

14 What we -- I wish I can tell you there was some sort
15 of highly scientific method for choosing yellow. We rested
16 with yellow because it was a soft color, it was
17 aesthetically pleasing, and it had no negatives to it when
18 we talked to consumers.

19 Q. Okay.

20 You have referred several times to talking to
21 consumers. Were a variety of packages or package designs
22 for Splenda tested with consumers before you launched?

23 A. Yes. Yes, we did look at a variety of designs in, you
24 know, focus groups or -- and so forth, to ask consumers if
25 in fact they were -- the product was communicating, you

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1 know, the trademark and the "made from sugar, tastes like
2 sugar," and some of the functionality of the product.

3 Q. Okay.

4 Let me show you Plaintiffs' Exhibit 8.

5 What is Exhibit 8?

6 A. This is the Splenda 50-packet box.

7 Q. And is this the trade dress that Splenda -- in which
8 Splenda packets have been sold since the retail launch of
9 Splenda in the fall of 2000?

10 A. Yes, it is.

11 MR. ZALESIN: And may I also have Exhibit 22.

12 BY MR. ZALESIN:

13 Q. What is Exhibit 22?

14 A. This is our -- the packet. It's sold inside of the
15 Splenda packet boxes.

16 Q. And what colors are used on the packet?

17 A. Yellow packet with blue type for -- that says "Splenda
18 No-Calorie Sweetener," and you read "made from sugar, so it
19 tastes like sugar."

20 Q. Let's go back to the package, the outside carton of
21 Splenda. And can you tell us, as the vice-president of
22 global marketing responsible for this product, what you see
23 as the key elements that make up the Splenda package trade
24 dress.

25 A. Well, the package is characterized first by sort of a

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1 pastel yellow background. The -- there is a sort of a white
2 cloud around the typeface, the sort of cursive letters that
3 say "Splenda No-Calorie Sweetener." You will notice that
4 that is in blue, but it is sort of a graduated blue from
5 light to dark.

6 The -- there is a coffee cup with a yellow packet
7 resting on it, a pitcher and a glass of iced tea in the
8 left-hand corner. There is the "made from sugar, tastes
9 like sugar" seal.

10 And then we have at the top, "Ideal for the Whole
11 Family."

12 We have got the pastel yellow and the blue logo, and
13 then the food treatments and the "made from sugar, tastes
14 like sugar" seal.

15 Q. Now, I think you told us that your objective was to
16 come up with a package design or look that was distinctive
17 from the other sweeteners, the blue aspartames and the pink
18 saccharin products.

19 Did you succeed, in your opinion?

20 A. Yeah.

21 This is very different from the market leaders that
22 were on the market at the time, Equal and Sweet'N Low.
23 Again, those were clearly identified as pink and blue, and
24 we chose a completely different color, yellow.

25 Q. And let me also show you Plaintiffs' Exhibit 31.

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1 Can you identify that for us?

2 A. Sure.

3 This is the granular equivalent of the packets. This
4 is about -- just under two ounces. It's equivalent in
5 sweetness to one pound of sugar, measures cup for cup like
6 sugar, and this again is Splenda. It's sucralose, but it is
7 used primarily for pouring, for cooking and baking.
8 Consumers use it really as they choose, but the simplicity
9 of it is that you simply just pour it out of the box.

10 The package design is characterized very similar in
11 terms of having the pastel yellow, the graduated blue
12 Splenda cursive letters with the swirl and the no-calorie
13 sweetener in there.

14 The -- in the left-hand corner again we've got the
15 "made from sugar, tastes like sugar" seal.

16 The primary difference here is that we have pictured
17 different foods to indicate sort of different functionality
18 of what is inside of the box.

19 Q. Okay.

20 Now, we saw earlier some figures that show a very
21 steep sales rise in Splenda. How did that come about? Did
22 that just happen all by itself?

23 A. No.

24 I -- we put great time and care into the launch of the
25 product and we invested a significant amount of money. To

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1 this date, we've invested over a hundred million dollars to
2 market the product in the U.S., and that is one of the
3 primary reasons that consumers are aware of the product and
4 that it is growing as quickly as it is.

5 Q. I am going to show you Exhibits 35 and 36.

6 Can you tell us what these are?

7 A. Sure.

8 Exhibit 35 is a story board for the first commercial,
9 the launch commercial that was used for Splenda. We ran
10 this for about two years, a year and a half or so.

11 And the Exhibit 36 is the current commercial that's on
12 the air for Splenda.

13 Q. Okay.

14 And these are -- or have there been other television
15 commercials and these are just examples?

16 A. These are the two primary commercials that we have
17 used in the U.S. market.

18 Q. Okay.

19 Now, I notice that the Splenda trade dress appears in
20 several frames of these commercials.

21 A. Yes.

22 Q. Is it typical for you to show the trade dress in your
23 advertising?

24 A. Absolutely. We want them to recognize the product.
25 We want them to get the key message and recognize the

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1 product and so that they've got a good feeling about it so
2 that they will notice it when they go to the supermarket.

3 Q. And you may have said this before, but roughly how
4 much have you spent to date advertising Splenda in the
5 United States?

6 A. Just about a hundred million dollars to date, since
7 the launch in 2000.

8 Q. Does McNeil also advertise Splenda in Puerto Rico,
9 specifically?

10 A. Yes. In fact, in Puerto Rico, as I've mentioned
11 before, they have got about five million dollars in sales
12 and have spent roughly three million dollars in advertising.

13 Q. Let me show you Plaintiffs' Exhibit 63.

14 Can you take a look at tell us what this is?

15 A. Yes.

16 This is a series of examples of ads that are run in
17 the Puerto Rican market for Splenda.

18 Q. So, for example, the first one -- we have my high
19 school Spanish, but "it's not sugar, it's Splenda"?

20 A. Yes, "no es azucar, es Splenda."

21 Yes, this one is -- basically, "it's not sugar, it's
22 Splenda." It's a coffee cup sort of made out of Splenda.

23 The other one is sort of -- it's a bit more diet
24 focused, and it gives sort of measurements, 34-24-34, and it
25 basically talks about -- it was a tie-in with the Miss

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1 Puerto Rico Universe 2001.

2 Q. We can page through this, but do all of these

3 advertisements in some way depict the Splenda trade dress?

4 A. Yeah.

5 The -- um, if you notice -- I mean, maybe it's a

6 little overkill, but we have reinforced the color, yellow,

7 in a number of different ways, whether it's sort of the

8 background of the ad or always in prominently showing our

9 product, our packaging.

10 Q. Okay.

11 With all of this advertising and all of this expense,

12 have consumers come to recognize the Splenda trade dress as

13 being associated with the Splenda brand?

14 A. Yes, they have.

15 Q. Do you do any research that speaks -- have you done

16 any research at McNeil that speaks to that issue?

17 A. Yes, we've done a number of different types of

18 research, some just sort of in the normal course of

19 business, to check and see how our product is performing.

20 And the data that we have suggests that in fact yellow is a

21 key association for our product.

22 Q. Let me hand you a couple of exhibits.

23 First, Plaintiffs' Exhibit 46 and Plaintiffs' Exhibit

24 47.

25 THE COURT: Excuse me, counsel.

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1 Plaintiffs' Exhibit 63 has Spanish and --

2 MR. ZALESIN: Oh, we need to provide a --

3 THE COURT: You must provide an official

4 translation together with the original Spanish if you want

5 to file it, but we must have a translation for this

6 document.

7 MR. ZALESIN: We can certainly do that, your

8 Honor.

9 The purpose for offering it is to show that the trade

10 dress is present in each of the advertisements, but we can

11 certainly provide the translations.

12 THE COURT: I would like to have a complete

13 record, and eventually, if this case goes to the Circuit, I

14 don't want to be reprimanded by the Circuit.

15 MR. ZALESIN: Absolutely, your Honor. Absolutely.

16 BY MR. ZALESIN:

17 Q. Here are Plaintiffs' Exhibits 46 and 47.

18 And while we are doing that, let me also hand you

19 Plaintiffs' Exhibit 48.

20 Can you tell us what these various exhibits 46 through

21 48 represent?

22 A. Yeah.

23 46 and 47 are a questionnaire that was done for our

24 consumer segmentation study that was done on Splenda in

25 2000. I am sorry, in -- last year. This is 2002. Yeah,

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1 2002 we sent these out. And they were sent to approximately

2 2400 consumers.

3 Q. All right.

4 And can you just briefly tell us what Exhibit 48 is.

5 A. Exhibit 48 is just sort of a summary of the

6 methodology that I asked my research director to prepare.

7 She sort of summarized, you know, what was the source of the

8 survey -- of the study, and what was the study designed to

9 demonstrate.

10 Q. Okay.

11 Are you familiar with this study?

12 A. Yes.

13 Q. Do you refer to this as the --

14 A. Consumer segmentation study.

15 Q. Consumer segmentation study. Okay.

16 Tell us a little bit about how this research was

17 performed.

18 A. Basically what was done was, as you see here, in about

19 September 2002, we worked with a company called Synovate,

20 which previously was called Market Facts. It's a company we

21 have done a number of different research projects with, as

22 well as a company called the Alcott Group. And we'd asked

23 them to segment the market for us.

24 So we sent out -- they worked together and they sent

25 out, approximately to 20,000 households, a post card

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1 inviting people to participate in this study with a

2 screener. We ended up with a representative U.S. sample of

3 approximately 2400 people, of which I think half of them got

4 Exhibit 46 and half of them got Exhibit 47. And the

5 exhibits are very similar. We just typically -- we had so

6 many questions, we split them up.

7 Q. And you said this was conducted in the United States?

8 A. It was conducted in the United States by the third

9 party, Synovate and the Alcott Group.

10 Q. Do you have any reason to believe that the data

11 collected in the United States is inapplicable in Puerto

12 Rico?

13 A. No, everything that we have found so far, quite

14 honestly, is that Puerto Rico is very similar to the U.S.

15 market in terms of the way it behaves, and so we believe it

16 is also representative of this market.

17 Q. Let me turn your attention in Exhibit 46 to page 14 of

18 the document, and specifically question 18(b).

19 Let me know when you are with me.

20 A. I didn't bring my glasses, but, yes.

21 Q. You don't have your glasses? Uh-oh.

22 A. It's okay. I can read it.

23 Q. There seems to be a lot of that going around today.

24 Let's see if we can focus this. Okay.

25 So why don't you just read what Question 18(b), the

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- 1 preamble to 18(b) says.
- 2 A. It says "Next, each product that you are familiar
- 3 with, regardless of whether or not you have ever used it,
- 4 'X' each statement you would use to describe that brand."
- 5 Q. And so the various brands that are being asked about
- 6 are what?
- 7 A. The brands that are being asked about are across the
- 8 top. It's Equal, Splenda, Sweet'N Low and sugar. And since
- 9 sugar is predominantly a private label or store brand, we
- 10 just said, you know, "Please think about the brand you are
- 11 most familiar with," rather than list all the different
- 12 brands of sugar.
- 13 Q. And let me ask you to focus on -- at about in the
- 14 middle of the page. "It comes in a yellow package."
- 15 Are you familiar with this question in the data?
- 16 A. Yes.
- 17 Q. Okay.
- 18 So let me at this point ask -- I will show you
- 19 Exhibits 18 and 19.
- 20 In the meantime, just so we are clear, consumers are
- 21 basically shown a list of attributes and they are being
- 22 asked whether they agree or disagree with whether that
- 23 attribute describes each of the four brands?
- 24 A. That's correct.
- 25 Q. And let's start with Exhibit 18.

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- 1 Can you tell us, first of all, what Exhibit 18 is? It
- 2 says on the front, "Sweetener Brand Perceptions Grid
- 3 Summary."
- 4 A. Yeah, the grid summary is pretty much just a summary
- 5 of everyone who took the survey, and then identifies at the
- 6 top the brands and then the people who were aware, the
- 7 number of people who were aware of that brand.
- 8 Q. So let's understand. For example, it says that with
- 9 respect to Equal, there is a number underneath Equal, in
- 10 parentheses, 1,111. And that refers to what?
- 11 A. That says that of the people who saw this survey,
- 12 1,111 of them were aware of Equal.
- 13 Q. And similarly for sugar it's 1,075?
- 14 A. That's correct.
- 15 Q. And this was out of how many people who got this
- 16 particular questionnaire?
- 17 A. This particular questionnaire, don't forget, went to
- 18 about half of the 2400, so it's actually about 1200 people.
- 19 Virtually everyone.
- 20 Q. And how many people were aware of Splenda at that time
- 21 in the late 2002?
- 22 A. Six hundred forty-seven people of the 1200 were aware
- 23 of Splenda.
- 24 Q. All right.
- 25 And turning to page 2 of the document, Exhibit 18, you

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- 1 have the results for "comes in a yellow package." Can you
- 2 take us through the data and what it shows?
- 3 A. I should have brought my glasses.
- 4 Okay, here we go.
- 5 Okay, what this basically says, what this grid summary
- 6 basically says is of this 647 folks who saw -- who were
- 7 aware of Splenda, roughly a fully 60 percent of them, of the
- 8 647, said that Splenda comes in a yellow package.
- 9 Now, if I could just sort of point out, if you just
- 10 sort of look down, as a marketer what I do is I look at this
- 11 page and I look at that number, but I also sort of look
- 12 vertically down the list to see what are the things that --
- 13 the primary things that a consumer would say I associate
- 14 with this brand. And the 60 percent that comes in a yellow
- 15 package is the single largest attribute that is associated
- 16 with this product. Okay?
- 17 And even though, you know, I have spent, as I said,
- 18 lots of money talking about, you know, has no calories, and
- 19 so forth, the single biggest thing is that it is in a yellow
- 20 package.
- 21 Q. So even more, for example, than the fact that it has
- 22 no calories.
- 23 A. That's correct.
- 24 Q. Okay.
- 25 And focusing again on the line about "comes in a

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- 1 yellow package," what does the data reflect for the other
- 2 brands, Equal, Sweet'N Low and sugar, for people who aware
- 3 of those products?
- 4 A. Well, clearly, of the people who are aware of Equal,
- 5 they know that it's not in a yellow package. And similarly,
- 6 for those who are aware of Sweet'N Low, three percent. So
- 7 they know that it's not in a yellow package.
- 8 And interestingly seven percent of fully all the
- 9 people who -- of the 12 of the 1,000 people who were aware
- 10 of sugar, only seven percent of them said that they thought
- 11 that sugar comes in a yellow package.
- 12 Q. Okay.
- 13 Now let's talk about Exhibit 19. Exhibit 19 -- well,
- 14 can you tell us generally what Exhibit 19 is?
- 15 A. Yeah.
- 16 This is -- so the first one that we talk about, the
- 17 grid summary talks about pretty much everyone who saw the
- 18 survey.
- 19 In addition to that, we sort of also sort of went
- 20 further down, and we were really just sort of looking at
- 21 people who were more aware of Splenda. And the first two --
- 22 Q. So let's turn to page 10, if we could. And I have
- 23 highlighted on the screen at least the "comes in a yellow
- 24 package" data. Can you take us through or tell us what it
- 25 shows or tells you as a marketer?

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- 1 A. Okay.
- 2 Again, these are people who are aware of Splenda. And
- 3 of the people who are aware of Splenda, 68 percent of those
- 4 people say -- I am sorry, I am looking at this "made from
- 5 sugar." Seventy-nine percent of them say that it comes in a
- 6 yellow package.
- 7 Q. Okay.
- 8 I am sorry, you said these are what kind of people?
- 9 Past-month users?
- 10 A. Past-month Splenda users, so that means they have
- 11 purchased a product -- a Splenda product within the last
- 12 four weeks.
- 13 Q. And 79 percent of them agree that it comes in a yellow
- 14 package?
- 15 A. That is correct, 79 percent of past-month Splenda
- 16 users say that it comes in a yellow package.
- 17 Q. And what percentage of the Splenda users say that
- 18 sugar comes in a yellow package?
- 19 A. Here seven percent of again past-month Splenda users
- 20 say that sugar comes in a yellow package.
- 21 Q. So it's the same seven percent that we saw among all
- 22 people who were even aware of sugar, right?
- 23 A. Yes, it's about the same number.
- 24 Q. All right.
- 25 Now, Mr. LoCascio, in his opening statement, talked a

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- 1 little bit about a sugar product called Domino. Let's talk
- 2 about that.
- 3 MR. ZALESIN: Can I have Plaintiffs' Exhibit 7,
- 4 please?
- 5 BY MR. ZALESIN:
- 6 Q. I am actually going to hand you 7 and 7(a).
- 7 While we are passing out exhibits, let me also give
- 8 you Plaintiffs' Exhibit 27.
- 9 Are you familiar with -- well, first tell us what
- 10 Exhibits 7 and 27 are.
- 11 A. Exhibit 27 is the white packet, and 7 is the Domino's
- 12 box of 100 sugar packets. 27 is what is sold inside of the
- 13 Domino's packet box.
- 14 Q. Are you familiar with the Domino's brand sugar?
- 15 A. Yes, I am.
- 16 Q. Tell us what you know about Domino's.
- 17 A. Domino's is, in terms of brands, one of the branded
- 18 sugar players in the -- primarily in the U.S. market. And
- 19 the package here, as we talked about before, is largely sort
- 20 of a sort of bright-yellow neon on the bottom half. The top
- 21 half is white. The type is in blue. And then it shows the
- 22 white Domino packets that are sold on the inside.
- 23 Q. Okay.
- 24 What percentage of sugar sales does Domino make in the
- 25 United States?

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- 1 A. Domino is one of the branded players.
- 2 Just to be clear, sugar is largely a private label, so
- 3 it's largely store brands, and so forth. Domino's is about
- 4 12 percent. Twelve to 13 percent of dollar sales and actual
- 5 volume sales.
- 6 Q. Of the overall U.S. sugar market.
- 7 A. Of the total U.S. market, retail market.
- 8 Q. Okay.
- 9 And you mentioned private label or store brands. What
- 10 are they?
- 11 A. They are sort of more generic types. You know, you go
- 12 into your supermarket. It might be labeled at the
- 13 supermarket, it might be labeled some sort of a smaller
- 14 player. There are a wide variety of different types and
- 15 sources. And those are the dominant forms of -- that's a
- 16 predominant way of sale for the sugar market. It's largely
- 17 a commodity business.
- 18 Q. Let me show you first Exhibit 53.
- 19 Can you tell me what that is?
- 20 A. Sure.
- 21 This is Dixie Crystals. This is -- it's very typical
- 22 of what you would see on the shelf next to Domino. You
- 23 know, white background, red with blue typing. It's not the
- 24 only way that category goes, but it's one of the primary
- 25 ways. And it's a traditional -- it's a pure cane sugar that

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- 1 is sold in the sugar aisle.
- 2 Q. And let me show you Plaintiffs' Exhibit 54.
- 3 Have you seen that before?
- 4 A. Yeah, this is something that is on the market here. I
- 5 am not as familiar with where else, if it's sold outside of
- 6 Puerto Rico. It's a Caribbean distributor. But it is a
- 7 cane sugar, a relatively generic product that is sold on the
- 8 store shelves here, two pounds.
- 9 Q. And finally -- I apologize for going out of order --
- 10 but 52 and 52(a).
- 11 Can you tell us what Plaintiffs' 52 is?
- 12 A. Yes.
- 13 Again, this is even more generic. It basically says,
- 14 "Snow white, pure cane sugar -- pure cane refined -- fine
- 15 granulated sugar." Very typical again. You've got the
- 16 white background to characterize the sugar, with some red
- 17 and blue typing and graphics.
- 18 Q. And as we saw earlier that the packet that Domino's
- 19 comes in is --
- 20 A. Is a white packet with blue typing, two shades of blue
- 21 on there.
- 22 Q. Is yellow the dominant color in the sugar category?
- 23 A. Yellow is not the dominant color in the sugar
- 24 category. It is identified by consumers as white.
- 25 Q. Now, let's talk about the sugar category or market a

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1 little bit.

2 Do you consider that to be the same market segment as

3 the no-calorie sweetener segment?

4 A. They are two clearly different categories.

5 Q. Explain what you mean by that.

6 A. One is sugar and all the properties of sugar. The

7 sugar substitute category was introduced, as I mentioned,

8 almost 50 years ago by Sweet'N Low, and it is a sugar

9 substitute. It is not -- it does not perform exactly as

10 sugar does, but it is offered to consumers who either like a

11 change of pace, because they want to reduce weight, or they

12 don't like the taste, want to reduce calories.

13 But the categories are -- really function very

14 separately and differently.

15 Q. Let's understand --

16 A. One is calories and one is no calories.

17 Q. So as somebody who is in charge of marketing the

18 leading no-calorie sweetener, in your understanding, do most

19 consumers go to the supermarket, go to the sweetener area

20 and decide, "I am going to buy a sweetener," and choose

21 among all the sugar brands and all the no-calorie sweetener

22 brands? Is that how it works?

23 A. No. They typically will go -- if they are going for a

24 no-calorie sweetener -- and this is how we measure our

25 market on a market share. It is not amongst all sweeteners

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1 but it is among the no-calorie sweeteners because the

2 consumer is going to the shelves specifically looking for

3 that product. Consumers will go looking for sugar because

4 you need -- you know, you need some more sugar for the

5 coffee pot or for the sugar bowl or for home use. But there

6 are different -- they go with a different mind-set entirely

7 to buy sugar or to buy a no-calorie sweetener.

8 Q. Let's talk about Merisant's product Same a little bit.

9 I know you have told us earlier that they have been

10 selling Same for about ten years as a value brand. Let's

11 put in their packaging. Here is Plaintiffs' Exhibit 11 and

12 11(a). And while we are at it, I will also show you 24 and

13 24(a).

14 Can you identify these exhibits for the record?

15 A. Sure.

16 This is a blue Same -- a blue box with the Same

17 sweetener, 50 packets. It is, again, a predominantly blue

18 box with a white and blue logo that says "Same Sweetener."

19 It shows a cup of coffee with a spoon on there and it says,

20 "The same great taste as sugar." There is a blue packet,

21 "The same great taste as sugar." Again, it's largely a blue

22 packet with various shades of blue on either the typeface or

23 some shading.

24 Q. And are there similarities between the Same box and

25 the blue Equal box or as for aspartame sweeteners?

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1 A. The similarities are largely the fact that it is

2 yellow and that you have sim --

3 Q. That is yellow?

4 A. I am sorry, it is blue. And they have similar

5 ingredients. But that's about it.

6 Q. And in Puerto Rico, who sells both of these products?

7 A. These products are both offered for sale currently by

8 Merisant.

9 Q. Okay.

10 Now, let me show you Plaintiffs' Exhibits 9 and 9(a).

11 Can you tell us what these are?

12 A. Yeah.

13 9 is the 50-packet box of Same, quite different to the

14 blue Same. It says here, "Same, 0-calorie sweetener." It

15 is a pastel yellow background, white coffee cup with two

16 packets on the packet with a bowl of strawberries and fruit

17 and kiwi, and on the left-hand side with a glass of -- I'm

18 not sure what that is. I assume that's orange juice, but

19 people typically don't use this category to sweeten orange

20 juice. And then in the left it says, "Made with sugar."

21 And then there is a sticker here that says, "Sweetened with

22 low-calorie sweeteners."

23 Interesting, though, that the Same logo, even though

24 it's the same typeface, was modified here to be a sort of

25 graduated blue as opposed to keeping the traditional white

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1 and light blue Same color.

2 Q. So that we are clear about that, the original blue

3 Same, Plaintiffs' Exhibit 11, had the word name "Same"

4 appear in what kind of typeface and in what colors?

5 A. The typeface -- the typeface and font seem actually

6 fairly similar, but it's interesting that the logo --

7 typically, you don't change your logo and you don't change

8 your name in terms of the color, because it's one of the

9 ways that consumers identify you.

10 On the blue Same it is a sort of white and shaded

11 blue, and on the yellow Same it is a blue sort of graduated

12 light to dark in a white cloud background.

13 Q. All right.

14 Now, Miss Sandler, to the extent that you can recall,

15 what was your reaction when you first saw the new Same

16 yellow Same box -- and actually, before we get to that, I am

17 not sure we covered this. In your understanding, what did

18 the new yellow Same box first start to appear in

19 supermarkets in Puerto Rico?

20 A. I believe it started to appear at the end of last year

21 in about December. It was brought to my attention in

22 January or so of this year.

23 Q. Okay.

24 And what was your reaction?

25 A. Honestly? I was horrified. I mean, I couldn't -- I

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1 couldn't believe it because I looked at it and I said, "This
2 can't be." It's -- it is exactly the same. I mean, from my
3 perspective.

4 You look at it, you see the same shading of yellow,
5 you see the cloud behind the logo, you see a graduated blue
6 name, you see a coffee cup on one corner and juice in the
7 other corner, you see a -- you know, an identification of --
8 ours is "made from sugar," theirs is "made with sugar." I
9 was very shocked.

10 Q. How about the size or the dimensions of the box? In
11 the case of the blue Same, how is that product oriented on
12 the shelf?

13 A. Yeah, the blue Same is a vertically oriented product
14 similar to the blue Equal box. So they stand side by side.
15 And interestingly, the orientation was changed. The yellow
16 Same is a horizontally oriented box, similar to the Splenda
17 box.

18 Q. And have you measured these boxes, the Splenda boxes
19 and the Same boxes, to compare their dimensions?

20 A. Yeah. I looked at -- when you look at the 50-packet
21 box, they are really pretty much the same in terms of
22 dimensions. One I think is a little bit deeper, but the
23 consumer doesn't see that. They are just seeing the front
24 panels side by side. And the height and the presentation,
25 the location of the logo, the cloud, the location of the

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1 items are almost identical.

2 Q. Can you tell us what Exhibit 33 is.

3 A. Yeah, Exhibit 33 shows the measurements, the height,
4 width and depth of the Splenda 50 packets, the Same 50
5 packets, the Splenda 100 packets, and the Same 100 packets.

6 What you see here is, if you just look at 50 packets
7 for a minute, Splenda 50 is, you know, three and
8 ten-sixteenths, Same 50 is three and nine-sixteenths. Okay?

9 The width, Splenda is four and thirteen-sixteenths,
10 Same is five and two-sixteenths. So the width is a little
11 bit wider.

12 And the depth, Splenda is two and Same is one and
13 twelve-sixteenths.

14 Q. So --

15 A. Very close. Very, very close to each other.

16 Q. And will you explain again what you were saying about
17 the difference in depth and how all that affects --

18 A. Well, the consumer doesn't see depth. I mean, the
19 consumer doesn't see the depth the way these products are
20 presented on the shelf. For the most part they are
21 presented side by side. And so, you know, these are
22 vertically -- these are virtually identical, from the
23 consumer perspective, in terms of the height and the size of
24 the product. And these both -- I am looking at right now
25 the 50-packet boxes.

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1 And especially if these are sold side by side on the
2 shelf, it can be very confusing.

3 Q. Have you learned anything about how the new yellow
4 Same product is being positioned in the Puerto Rico market?

5 A. Yeah, it appears to be positioned to be targeting the
6 Splenda consumer, the Splenda users. Um --

7 Q. Let me stop you there and ask you to take a look at
8 Plaintiffs' Exhibit 15.

9 MR. ZALESIN: For this one, your Honor, I am going
10 to hand the witness 15 and 15(a). 15(a) is the official
11 Spanish translation. And I will get you the other exhibit
12 63.

13 BY MR. ZALESIN:

14 Q. What is Plaintiffs' Exhibit 15?

15 A. This is what we call in the industry a sell sheet.
16 Typically the salesmen take these and they go to the
17 retailers to present their product, and this product
18 basically says, you know, "New Same with sugar. It's
19 97 percent sugar."

20 On the back it gives you the pricing. It says here --
21 if you look at where it says "Same with sugar," it gives you
22 the pricing and then it lists a competitor. These are
23 clearly the Splenda prices. No other product is priced this
24 way in the marketplace.

25 Q. Okay, so where it says "competition"?

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1 A. Yeah, "competidor." The competition here is in fact
2 Splenda. That's the Splenda pricing in the Puerto Rico
3 market. No one else is really priced that way.

4 Q. So they are showing a 13 to 15 percent price
5 differential versus Splenda.

6 A. Yes.

7 Q. Is there any other product they are comparing
8 themselves to?

9 A. No, this is the only product that is listed on the
10 self sheet.

11 Q. So what does that tell you about how they are
12 positioning the yellow Same?

13 A. To me it suggested they are clearly targeting -- this
14 is the only one that is highlighted -- they are clearly
15 targeting Splenda as the primary competitor.

16 Q. What do you think is going to happen out there in the
17 Puerto Rico market now that there are these two products,
18 Splenda and Same, that, as you've testified, look so much
19 alike?

20 MR. LoCASCIO: Objection, your Honor.

21 She's going to speculate as to what is going to happen
22 in the marketplace?

23 THE COURT: Well, I think she has sufficient
24 experience with marketing so as to make a projection right
25 here.

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1 Your objection is overruled.

2 **THE WITNESS:** Yeah, I would tell you. I mean,
3 after 20 years of marketing there are a couple of things I
4 can say.

5 Consumers do not spend -- the average female housewife
6 is not spending 20 minutes on the shelf studying each
7 product that she's purchasing, which is why you want to
8 differentiate your product from your competitors. Consumers
9 tend to have not as much time to shop. They are shopping
10 very quickly.

11 And what happened here -- what I believe what happened
12 here, as we heard earlier today, is that people will very
13 likely confuse these two. There is not a lot of
14 differentiation between the two and they are marketed side
15 by side in many cases on the shelf.

16 So what I predict will happen, quite honestly, is, as
17 the market leader in this market, the first thing that will
18 happen is that I will lose sales.

19 People will get -- will be confused. Either they will
20 pick up this product accidentally or they will pick up this
21 product because they believe it is associated with the
22 market leader. And that will cause a loss of sales for
23 Splenda. How much, I couldn't tell you. That's just really
24 impossible, unless you watch every consumer at every shelf.
25 I couldn't quantify it.

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1 I can tell you with real certainty that that will
2 happen, though, that there will be -- I can predict a loss
3 of sales for the Splenda business in Puerto Rico.

4 The other thing that I can tell you is, you know --
5 and I don't know how to put this nicely, but you've got a
6 product here basically getting a free ride. They are not
7 spending a lot of many on advertising. As I've said, I've
8 spent over a hundred million dollars in U.S., over three
9 million dollars in this market to promote the product, to
10 talk about what it is, and you now have a product that is
11 being launched on the shelves, with no consumer
12 communication, that basically is getting a free ride off of
13 the market leader by positioning itself and changing its
14 brand to look more like this one.

15 And consequently, if consumers do in fact pick up this
16 product and think that it is in any way associated with this
17 yellow Splenda, I've lost good will, I've lost control of the
18 trademark that I have established.

19 So I basically will -- and I've lost complete control,
20 therefore, of the trademark because I have nothing to do
21 with this product, I don't know what kind of experience the
22 consumer will have, and therefore I've lost control of my
23 brand and I've lost good will.

24 **BY MR. ZALESIN:**

25 Q. Miss Sifontes, the first witness, told a story about

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1 mistakenly buying Same and then putting it in her coffee and
2 being able to tell it didn't taste like Splenda. Is that of
3 concern to you?

4 **A.** Absolutely. And look, you know, almost anyone here
5 who does primary grocery shopping, it is a routine -- it is
6 a routine sort of very habitual process, especially if you
7 are established in a category.

8 Consumers go out there, they are not spending 20
9 minutes studying every single product. They do tend to pick
10 up what they are familiar with. And that is -- it is not
11 that unusual. It is not that unusual that you don't
12 remember exactly what store and what time and how many times
13 you've touched the package. That is a very normal
14 experience for a consumer.

15 And so, yes, I do believe that you will have -- that
16 that is representative of what is happening in this market
17 and what will likely happen to an even greater extent as
18 this product grows in distribution.

19 **Q.** Is there any risk to the public in terms of health
20 consequences from this situation?

21 **A.** Well, there is one that I would like to point out.

22 All products that contain aspartame have to carry a
23 warning label, because they have an ingredient in there that
24 is phenylal -- I can never pronounce this. Phenylalanine.
25 PKU is the way we refer to it in the industry. And for a

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1 small -- for people who are called phenylketonurics, for a
2 very small percentage of people -- I do want to point out it
3 is small, but it is important enough that it is required on
4 all products to be absolutely labeled -- that any products
5 that contain phenylalanine must be labeled so the consumer
6 who is a phenylketonuric will know, because they would have
7 some potentially very serious adverse affects.

8 Now, the risk that I'd like to point out is if the
9 consumer is not studying the product and in fact they reach
10 for this and pick it up thinking that it is Splenda, they
11 are likely not to study this package in any major way,
12 therefore, they will not know, if they are phenylketonuric,
13 that there is phenylalanine in this product.

14 **Q.** Okay.

15 Miss Sandler, are you familiar with a no-calorie
16 sweetener, a saccharin product, called Sugar Twin?

17 **A.** Yes, I am.

18 **MR. ZALESIN:** Can I have Exhibit 30, please, and
19 30(a).

20 **BY MR. ZALESIN:**

21 **Q.** I show you Plaintiffs' Exhibits 30 and 30(a).

22 First, for the record, can you tell us what these
23 exhibits are?

24 **A.** Okay.

25 This is a Sugar Twin box of 100 packets, and it --

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- 1 would you like me to go ahead and describe it?
- 2 Q. Well, actually, first tell us what the Sugar Twin
- 3 product is. What do you know about it?
- 4 A. Okay.
- 5 Sugar Twin is a no-calorie sweetener. The primary
- 6 ingredient in this product is actually saccharin.
- 7 Q. It is a major brand in the United States?
- 8 A. No, it's not.
- 9 Sugar Twin -- is it available for sale? Yes.
- 10 Sugar Twin, when Splenda was launched in 2000, had
- 11 been rapidly declining year over year over year due to lack
- 12 of support and investment from the makers.
- 13 Q. When you say "support and investment," just so we all
- 14 know what that means --
- 15 A. Advertising support, pricing support in the
- 16 marketplace. It had little or no investment of that form,
- 17 and so it had been a brand that had been rapidly declining.
- 18 Currently Sugar Twin in the U.S. market is just under
- 19 two share points in terms of dollar sales, and in this
- 20 market it is, you know, less than one tenth -- I think it's
- 21 .05, or something like that.
- 22 Q. Less than one tenth of one percent.
- 23 A. One tenth of one percent.
- 24 Q. And by "this market," you are referring to the Puerto
- 25 Rico market?

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- 1 A. The Puerto Rico market, yes.
- 2 Q. Do most stores in Puerto Rico carry Sugar Twin?
- 3 A. I believe they do. I mean, the products are available
- 4 for sale. The consumers are not taking them off the
- 5 shelves, as evidenced by the sales numbers.
- 6 Q. Okay.
- 7 Most stores do or some stores do?
- 8 A. Some stores do. At that rate of sale, not all stores
- 9 are going to carry it.
- 10 Q. Okay.
- 11 I think you told us, they are not doing any
- 12 advertising in the continental United States. Does Sugar
- 13 Twin do any advertising in Puerto Rico?
- 14 A. Not to my knowledge, no. As I said, they are -- have
- 15 very few dollar sales to demonstrate.
- 16 Q. Now, what about the package design or graphics of the
- 17 Sugar Twin box?
- 18 A. Okay, sure.
- 19 What you have got here is a sort of what I would call
- 20 a flat design, sort of flat art. It's a neon yellow, yellow
- 21 to white, with the name Sugar Twin in blue in the top
- 22 right-hand corner. You've got a white coffee cup with a
- 23 yellow Sugar Twin packet near the handle on the right-hand
- 24 side and then you've got a tall glass of iced tea on the
- 25 left-hand side and a banner that says, "Sweet taste, sweeter

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- 1 price." It is a low-priced offering in the marketplace.
- 2 Q. Okay.
- 3 And were you aware of the existence of Sugar Twin when
- 4 you launched Splenda in yellow packaging?
- 5 A. Yes, we were.
- 6 As I mentioned, in the U.S. especially, Sugar Twin had
- 7 been rapidly declining, apparently on its way to extinction.
- 8 The manufacturer was not supporting it, was not promoting
- 9 it. Consumers were not very aware of it. And most
- 10 importantly, when we talked to consumers, consumers did not
- 11 identify that this was a product that owned the color
- 12 yellow. That was very important, they did not own the color
- 13 yellow.
- 14 Q. When you chose yellow packaging for Sugar Twin (sic),
- 15 did you try to steal the good will that Sugar Twin had built
- 16 up in the yellow coloring scheme?
- 17 A. Well, quite frankly, Sugar Twin didn't have any good
- 18 will at that point that I could -- that I would even
- 19 consider. As I said, it was a rapidly declining brand. It
- 20 was being, in some cases, removed from store shelves because
- 21 it was not moving as quickly as many manufacturers --
- 22 retailers would have liked. So there was really no good
- 23 will for us to benefit from, and that was clearly not the
- 24 intent.
- 25 Q. And Splenda has been on the U.S. market, the retail

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- 1 market, for how long? About three and a half years?
- 2 A. About three and a half years. As I said, it was
- 3 introduced in September of 2000.
- 4 Q. Are you aware of any instances of actual consumer
- 5 confusion between Sugar Twin and Splenda?
- 6 A. No, none whatsoever.
- 7 Q. Have you ever received a complaint from a consumer
- 8 that the two look confusingly similar?
- 9 A. No complaints from consumers.
- 10 Q. Have you ever gotten a complaint from the manufacturer
- 11 of Sugar Twin about your packaging?
- 12 A. We have never received a complaint from the makers of
- 13 Sugar Twin about a -- a complaint in terms of the packaging
- 14 design.
- 15 Q. If anyone today were to look -- who is not familiar
- 16 Sugar Twin, were to look at it and somehow associate it with
- 17 Splenda, do you have any understanding or explanation of why
- 18 that might be?
- 19 A. Sure. As I mentioned before, we spent a great deal of
- 20 money to establish yellow as the Splenda color, so anyone
- 21 who is not familiar with Sugar Twin who sees it would
- 22 probably think it's part of Splenda because it's yellow.
- 23 You know, the aspartame products tend to have blue.
- 24 The people have grown to think of the category in that way.
- 25 So if they are not familiar with the brand and they see it,

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- 1 they might very likely identify it as part of the Splenda
2 family.
3 Q. Miss Sandler, I am just going to put a couple of
4 additional exhibits in the record, and then we are going to
5 wrap up, I promise you. I appreciate your indulgence.
6 **MR. LoCASCIO:** If they have questions, obviously
7 we have no objection. But if they just want to put
8 something in the record --
9 **MR. ZALESIN:** No, what we will do is just take one
10 minute.
11 Here is Exhibit 4 and Exhibit 5. And Exhibit 6. No,
12 I am sorry, Exhibit 3.
13 Your Honor, the reason for the repetition is that
14 there are different sized packages, and this is simply to
15 complete the record.
16 **BY MR. ZALESIN:**
17 Q. Can you tell us quickly, Miss Sandler, what
18 Exhibits 3, 4 and 5 are?
19 A. One is the Equal box of 50 packets --
20 Q. That's Exhibit 4?
21 A. Exhibit 5 is the NutraSweet box of I believe 50
22 packets as well. One hundred packets, I am sorry.
23 Q. And can you go back and check which one was Equal, 50
24 or 100?
25 A. Fifty packet.

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- 1 Q. Exhibit 4?
2 A. Yes.
3 4(a) is the 100 packets.
4 Q. And Exhibit 5 or 5(a)?
5 A. 5(a) is the NutraSweet 100 box of packets.
6 Q. So let's understand.
7 Are you trying to stop Merisant from selling products
8 in competition with you?
9 A. No, absolutely not.
10 Q. Okay.
11 A. Competition is actually good for the business.
12 Q. Okay.
13 A. I am not trying to stop them from selling their
14 product.
15 Q. Okay, so they sell Equal here --
16 A. They sell a number of sweeteners, mostly aspartame
17 sweeteners, and these are three that are available in the
18 market in this area.
19 Q. Okay.
20 And you have no problem with them selling any of these
21 products?
22 A. Absolutely not.
23 Q. Do you object to them selling a sweetener that is
24 sweetened with aspartame and is bulked with sugar in the way
25 this new, what Mr. LoCascio calls Same with sugar product

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- 1 is?
2 A. No, I do not.
3 Q. Okay.
4 So why are you suing them?
5 A. The reason for suing them is the fact that they took
6 pains to design their packaging to look exactly like the
7 package that I designed and that I have invested money in
8 this marketplace to become the market leader.
9 Had they done this launch with a completely different
10 look and feel, green box or, you know, orange box, we
11 wouldn't be here today. The issue is that they took a
12 yellow pastel box, a cloud behind a blue graduated logo, and
13 items positioned in exactly the same way as the Splenda box,
14 almost intent on confusing consumers, and that was the
15 issue. That is the issue.
16 **MR. ZALESIN:** I have no further questions, your
17 Honor.
18 **THE COURT:** So that is your direct.
19 Before we start with cross, then, we will take our
20 lunch break and we will be back here by 2:30.
21 (Whereupon, at 1:00 p.m. a luncheon recess is
22 taken.)
23
24
25

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Afternoon Session (2:45 p.m.)

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- 1 **THE COURT:** I remind you that you are under oath.
2 **THE WITNESS:** Yes, sir.
3 **MR. LoCASCIO:** Good afternoon, your Honor.
4 **CROSS-EXAMINATION**
5 **BY MR. LoCASCIO:**
6 Q. Good afternoon, Miss Sandler.
7 A. Good afternoon.
8 Q. You testified that in your view the market was the
9 same between the United States, continental, and Puerto
10 Rico; is that correct?
11 A. Yeah, they are very similar.
12 Q. Well, in the mainland continental United States, how
13 many percent of the marketplace does the brand name Same
14 have?
15 A. Well, it's not for sale in the market.
16 Q. So in the United States continental market, the brand
17 name Same is not sold at all, correct?
18 A. That's correct.
19 Q. And here, in Puerto Rico, the brand name Same, based
20 on volume, is the market leader. Most boxes sold in Puerto
21 Rico is the brand name Same, correct?
22 A. That's correct.
23 Q. And you are aware that McNeil's lawyers and McNeil
24 already stipulated in this case that Same is widely
25 recognized in the Puerto Rican market, correct?

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Debra Sandler - Cross (LoCascio)

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- 1 A. That's correct.
- 2 Q. Okay.
- 3 A. Would you like me to clarify what I meant when I said
- 4 that the markets were similar?
- 5 Q. No thanks.
- 6 A. Okay.
- 7 Q. The product Same is sold here, not sold in the United
- 8 States market; that's right?
- 9 A. Yeah, that's correct.
- 10 Q. And you recognize in your affidavit that between 2000
- 11 and 2003 -- this is in paragraph 12 -- you say Equal's
- 12 dollar share decreased from 39 to 32 percent. So in your
- 13 view, as of 2003, in Puerto Rico, Equal was 32 percent of
- 14 the market based on dollars, right?
- 15 A. That's correct.
- 16 Q. And Same is 27 percent by dollars of the market,
- 17 correct?
- 18 A. That's correct.
- 19 Q. And those numbers are deflated in a dollar share
- 20 analysis versus a volume share analysis because Splenda's
- 21 price is more than Same's price, for instance.
- 22 A. As is Equal's, yes. Same is a value-priced product.
- 23 Q. Same is priced lower than Equal.
- 24 A. Yes.
- 25 Q. And Same is priced lower than Splenda.

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Debra Sandler - Cross (LoCascio)

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- 1 A. That's correct.
- 2 Q. You are aware that McNeil has certain federal
- 3 trademark registrations relating to Splenda, correct?
- 4 A. Yes.
- 5 Q. For instance, the name Splenda.
- 6 A. Yes.
- 7 Q. And, for instance, the logo for Splenda, McNeil
- 8 obtained a federal registration for that logo. The word
- 9 "Splenda" in that stylized font with -- I'll call it the
- 10 swoosh. Is that what you call it?
- 11 A. Swirl. Swirl, swoosh.
- 12 Q. Swoosh, swirl.
- 13 A. We call it swirl.
- 14 Q. That's part of the Splenda trademark, correct?
- 15 A. That is correct.
- 16 Q. And when Splenda, McNeil in this case, went to get
- 17 federal registration, part of that idea is that people
- 18 associate the Splenda name and the stylized Splenda with the
- 19 swoosh with Splenda, correct?
- 20 A. That's correct.
- 21 Q. McNeil doesn't have a federal registration for the
- 22 overall box design for Splenda, for any of the Splenda
- 23 boxes, correct?
- 24 A. Not to my knowledge.
- 25 Q. Okay.

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Debra Sandler - Cross (LoCascio)

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- 1 As far as you know, McNeil has never filed any
- 2 applications to get those rights, correct?
- 3 A. Not to my knowledge. I can't say that definitively,
- 4 but not to my knowledge.
- 5 Q. They may have filed but not received a trademark, but
- 6 you don't know.
- 7 A. No, that's correct.
- 8 Q. You mentioned several times during your direct that
- 9 consumers go to the store and they don't have, twice your
- 10 words, 20 minutes to compare products. Remember that?
- 11 A. Yes, I do.
- 12 Q. Does it take 20 minutes to tell that this is Splenda
- 13 (indicating) and this is Same (indicating)?
- 14 A. Does it take -- I'm not -- does it take 20 minutes?
- 15 I'll tell you I've reached for the Same product myself
- 16 when I was reaching for Splenda. I'm not sure I understand
- 17 what you are saying.
- 18 Q. You haven't been in a store in Puerto Rico and gone
- 19 shopping for sweeteners, have you?
- 20 A. No, but I have been try -- as we looked at this case,
- 21 just sort of reaching for product, and a couple of times I,
- 22 myself, picked up the Same product accidentally.
- 23 Q. Miss Sandler, if you look at these products, do you
- 24 think it takes more than two or three seconds to read the
- 25 name Same versus the name Splenda?

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Debra Sandler - Cross (LoCascio)

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- 1 A. If you study the package, you can see the difference.
- 2 If you study them.
- 3 Q. I'd like you to answer my question, Miss Sandler.
- 4 How long does it take to read the name Same and read
- 5 the name Splenda? More than two or three seconds?
- 6 A. A little more, yeah. But not 20 minutes. You can
- 7 quickly read the name Same.
- 8 Q. You measured some packages, and you had a
- 9 demonstrative. It's right on top. Can you get that? The
- 10 very top piece of paper. Yes.
- 11 A. Yes. This is the dimensions for each of the packages,
- 12 yes.
- 13 Q. Which exhibit number is that?
- 14 A. Exhibit No. 33.
- 15 Q. Okay, Plaintiffs' 33.
- 16 That has two boxes on it, right? Two dimensions? The
- 17 100 pack and the 50 pack.
- 18 A. Well, four, yeah. The Splenda 50, the Same 50, the
- 19 Splenda 100 and the Same 100.
- 20 Q. You said you did the measurements yourself.
- 21 A. Yeah, I measured them when we were in the lawyers'
- 22 offices.
- 23 Q. Splenda sells a 200 pack, right?
- 24 A. Yes, we also sell a 200 pack.
- 25 Q. Same sells a 200 pack?

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 A. I believe so.
- 2 Q. Did you measure those boxes?
- 3 A. I did not personally, no.
- 4 Q. Were you there when someone else measured them?
- 5 A. No, I was not.
- 6 Q. They are not included on your chart, are they?
- 7 A. No.
- 8 Q. I believe, Miss Sandler, you have in front of you, all
- 9 the way on the end, it looks like the Splenda 200 pack.
- 10 A. Yes, I do.
- 11 **MR. LoCASCIO:** I don't know if that 200 pack has
- 12 been entered into evidence, so I will go ahead, just to make
- 13 sure we do.
- 14 Defendants' D is the Splenda 200 pack. We have
- 15 already given one to the witness earlier. And I will put in
- 16 Defendants' A, which is the Same with sugar 200 pack.
- 17 Can you give one to the witness? Thank you.
- 18 Earlier, McNeil's lawyer said that we wanted to make
- 19 sure all the packages were in to complete the record. This
- 20 package was not in, so now I think the record is more
- 21 complete.
- 22 **BY MR. LoCASCIO:**
- 23 Q. That's the 200 pack of Splenda and the 200 pack of
- 24 Same.
- 25 A. Um-hmm.

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 Q. Those packages aren't the same size, are they?
- 2 A. No. The Same box is taller. Slightly narrower, but
- 3 about the same width, but it is taller.
- 4 Q. And when you made your chart about how the boxes were
- 5 the same size, you put the 50 and you put the 100, but you
- 6 didn't put the 200, right?
- 7 A. No.
- 8 Q. Fair to say in your business, competing products often
- 9 look alike?
- 10 A. No, I don't think so.
- 11 Q. Okay.
- 12 A. Not if you are talking about Equal, Sweet'N Low and
- 13 Splenda. I think they are quite different.
- 14 Q. Johnson & Johnson makes cotton swabs, correct?
- 15 A. Yes.
- 16 Q. A lot of other people make cotton swabs, correct?
- 17 A. That's correct.
- 18 Q. CVS?
- 19 A. Um-hmm.
- 20 Q. Q-Tips?
- 21 A. Yes.
- 22 Q. Cotton swabs come packed in a blue package a lot,
- 23 don't they?
- 24 A. Yes.
- 25 Q. That doesn't mean one of them owns blue, does it?

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 A. No.
- 2 Q. It means when people go to the cotton swabs section,
- 3 all the cotton swabs are in blue, and how do you distinguish
- 4 which one? Withdrawn.
- 5 Do you have a cotton swab preference?
- 6 A. I buy the Johnson & Johnson Q-Tips.
- 7 Q. A loyal employee.
- 8 Do you buy them from the company store or do you buy
- 9 them at the drug store?
- 10 A. I tend to buy them from the company store.
- 11 Q. Okay.
- 12 Inside McNeil, there is a store where you can buy your
- 13 Johnson & Johnson swabs?
- 14 A. That's correct.
- 15 Q. Have you ever bought them in a regular store?
- 16 A. Before I was a Johnson & Johnson employee, sure.
- 17 Q. When you were buying Q-Tips, did you look for the blue
- 18 package, or did you look for the Johnson & Johnson package?
- 19 A. To be perfectly honest with you, I don't think I -- I
- 20 think I just picked up -- it's not a very involved category.
- 21 I think I just picked up what was in front of me.
- 22 Q. So you didn't look at the brand names then?
- 23 A. No, not really.
- 24 Q. Okay.
- 25 Do you have any kids, Miss Sandler?

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 A. Yes, I do. One little girl.
- 2 Q. I take it you use Johnson's Baby Shampoo.
- 3 A. Well, she's not a baby anymore, but we did.
- 4 Q. You are aware that other people compete with Johnson's
- 5 Baby Shampoo --
- 6 A. Yes.
- 7 Q. -- in a package that looks a lot like Johnson's &
- 8 Johnson's (indicating).
- 9 And how are these distinguished by consumers? By the
- 10 brand names, right?
- 11 A. I think the brand name, and I know that the teardrop
- 12 is important on that one, yeah.
- 13 Q. Isn't it fair to say package branding, the name on the
- 14 package, is one of the most significant identifiers of the
- 15 product?
- 16 A. Yes, that's correct.
- 17 Q. And consumers know brand names very well, correct?
- 18 A. That's correct.
- 19 Q. When they go to the store, they look for the brand
- 20 they know.
- 21 A. That's correct.
- 22 Q. Is it also fair that in consumer products, different
- 23 categories take on colors sometimes?
- 24 A. That's correct.
- 25 Q. For instance, ginger ale, generally green.

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 A. Um-hmm.
- 2 Q. As we saw Q-Tips or cotton swabs, the generic blue.
- 3 A. Um-hmm.
- 4 Q. Do you agree that -- the first sentence you have
- 5 already agreed with. Do you agree that these kinds of
- 6 distinctions, whether derived from common association, e.g.
- 7 orange for orange juice, or the market leader, e.g. amber
- 8 mouthwash based on Listerine, are an accepted part of
- 9 marketing? Do you agree with that?
- 10 A. I am sorry, can you tell me what you are asking me to
- 11 agree with? Is it the second sentence?
- 12 Q. The second sentence (indicating).
- 13 A. I am sorry, the question is?
- 14 Q. Do you agree with that?
- 15 A. Yeah.
- 16 Q. Do you also agree that generic manufacturers make a
- 17 practice of packaging their product in the colors used by
- 18 the market leader so as to communicate to the consumer that
- 19 they are the same kind of product, but at a lower price?
- 20 Do you agree with that?
- 21 A. That has often been done.
- 22 Q. Do you agree that McNeil, frequently being the market
- 23 leader, has had its color patterns followed by others
- 24 before?
- 25 A. As I said, I've only really worked on this business,

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 but I believe that to be the case. You just showed a
- 2 couple. Not McNeil, but Johnson & Johnson.
- 3 Q. Is it your understanding that McNeil and Johnson &
- 4 Johnson's position is it does not challenge such uses of its
- 5 colors, but recognizes it as an accepted part of marketing?
- 6 A. I understand that.
- 7 Q. And you understand that McNeil has taken that position
- 8 before and that that's the position of McNeil.
- 9 A. I understand that in a previous case, that that was
- 10 the position taken on a completely different product and
- 11 category.
- 12 Q. Today you don't disagree with that position, do you?
- 13 A. In this par -- if we are talking about this case, I
- 14 have an issue, yes.
- 15 Q. But in general, you would agree that McNeil doesn't
- 16 challenge the use by others of its colors because it's an
- 17 accepted part of competition.
- 18 A. That's correct.
- 19 Q. Do you agree, as McNeil has previously said, if
- 20 colors -- do you agree that the first entrant to a
- 21 particular market has no right to a perpetual monopoly on
- 22 the use of a standard color as the background for a package?
- 23 Do you agree with that?
- 24 A. That sounds a lot like legalese. That's hard for me
- 25 to say. It seems to make sense, but that's hard for me to

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 say.
- 2 Q. In your view, when you choose to launch a new product,
- 3 is it your position that the background color of the market
- 4 leader cannot be used by anyone else? Is that your
- 5 position?
- 6 A. Say that again?
- 7 Q. Do you believe that the background color of a product,
- 8 when you are the market leader, cannot be used by any other
- 9 competitor?
- 10 A. Do I agree that the background -- if I'm the market
- 11 leader -- again, I'm talking here in this category. You are
- 12 asking me all brands, all categories. It's really difficult
- 13 to say.
- 14 Q. In your experience, Miss Sandler, have you ever had a
- 15 product, no matter where you've worked, where another
- 16 company came out and used the same background color as your
- 17 product?
- 18 A. Naturally.
- 19 Q. Have you ever launched a product where you entered a
- 20 market and someone had already used the background color
- 21 that you put on your new product?
- 22 A. Well, as we testified before, Sugar Twin was in the
- 23 market. It was a small business, but they did have some
- 24 yellow in their packaging.
- 25 Q. I'd like to talk about the sweetener market. You

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 talked about the U.S. market, where Same wasn't in the U.S.
- 2 marked but it is here in the Puerto Rican market.
- 3 A. Yes.
- 4 Q. You launched Splenda in Canada. It was on sale in
- 5 Canada for some time, correct?
- 6 A. That's correct.
- 7 Q. Is the box in Canada the same as it is in the United
- 8 States?
- 9 A. It's slightly different.
- 10 Q. Is the background color yellow?
- 11 A. Yes, it is.
- 12 Q. Are you aware that Sugar Twin is a significant player
- 13 in the Canadian market for sweeteners?
- 14 A. Yes, I am.
- 15 Q. That's true, right?
- 16 A. Yes, that's true.
- 17 Q. Indeed, they are the market leader by volume.
- 18 A. Yes, that's correct.
- 19 Q. So when you said before that Sugar Twin is a small
- 20 player and that they don't matter, you always use the phrase
- 21 U.S. market.
- 22 A. That's correct.
- 23 Q. But where Splenda first launched -- pardon me, where
- 24 McNeil first launched Splenda in a yellow package, Sugar
- 25 Twin is the dominant player in that market, correct?

BARBARA DACHMAN, RPR, OCR

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- 1 A. In the Canadian market, Sugar Twin is the dominant
2 player, yes.
3 Q. And it's sold in the United States.
4 A. Sugar Twin, yes.
5 Q. And it's sold in stores here in Puerto Rico.
6 A. Yes.
7 Q. Have you ever sent any letters to Sugar Twin telling
8 them now that you are in the U.S. the market leader, you
9 don't like that they are using a yellow background in blue
10 letters and white?
11 A. No.
12 Q. Have you ever made any efforts to stop them from using
13 the box they have used for years?
14 A. No.
15 Q. Indeed, you don't think that the Sugar Twin package is
16 confusing, correct, to Splenda?
17 A. No, I do not.
18 Q. And if -- you don't believe you can prevent Sugar Twin
19 from using the box they are using just because you make
20 Splenda with a yellow background. Are you saying that?
21 A. Say that again?
22 Q. Sure.
23 You are not saying you are the only company that can
24 use the yellow background for sugar substitutes.
25 A. No. No. No, that's not what I am saying. What I am

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 saying is the overall. It's not just the color. It's the
2 look, it's the positioning of the products, it's the
3 gradation of the logo, it's the cloud behind the logo. It's
4 the whole positioning of the "made from sugar," "made with
5 sugar." It's the whole thing. Not just the yellow.
6 Q. So you are not here today to declare that you are the
7 only company that can use yellow in sugar substitutes.
8 A. No.
9 But I will say that, as we showed before, the category
10 is such that consumers have come to identify the color
11 yellow. Especially as they go into restaurants, they just
12 are looking at the top. They are looking at color. So the
13 color yellow has come to be a strong brand association.
14 But, you are right, I am not saying, you know, no one
15 else can use yellow. What I am taking issue at here is
16 the -- just the overall presentation is just confusing to
17 consumers.
18 Q. If people associate yellow -- withdrawn.
19 If people think Splenda's package comes in yellow and
20 that's the package they see the most of in yellow, that
21 doesn't mean to you that other people can't make a yellow
22 packet, does it?
23 A. I think if other people make the yellow packet but
24 it's different from the Splenda, it's clearly different from
25 the Splenda packet, they have that right to do that.

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 Q. I don't believe you have up there the Same package.
2 Do you have both packets?
3 A. I actually do.
4 Q. Okay.
5 MR. LoCASCIO: I don't know that the Same one has
6 been put into evidence. Let me go ahead and do that. I
7 don't know if your Honor has one.
8 THE COURT: Yeah, I have it.
9 MR. LoCASCIO: Packets?
10 THE COURT: Oh, the packets.
11 BY MR. LoCASCIO:
12 Q. Do you have both?
13 A. Yes, I have.
14 Q. The Splenda packet is Plaintiffs' Exhibit 22; the Same
15 packet is Plaintiffs' Exhibit 23.
16 Do you believe those two packages are confusing?
17 A. I think the shape is different and the color is
18 different, except this is not what consumers are buying.
19 Q. Okay.
20 So in a marketplace where consumers go to see packets,
21 for instance, food service. Food service market is when you
22 go to a restaurant and there is a dish on the table and
23 there is sugar, there is Equal, there is Sweet'N Low, there
24 is Same, there is Splenda, et cetera. That's what that
25 market is called.

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 A. That's correct.
2 Q. In the food service area, consumers don't see the box
3 you are looking at, they see the packet.
4 A. Um-hmm.
5 Q. So I am clear, your testimony is looking at the Same
6 packet and looking at the Splenda packet, those are not a
7 problem for you. They are not confusing.
8 A. That's hard for me to say only because what I think
9 you really want to do is if you put these in the -- usually
10 the bowl or tray, consumers are not seeing these dimensions
11 as we have them here. They are typically just looking over
12 the top. Right? So in that case, in that particular
13 instance, I think it can be confusing.
14 Now, if you hold it up this way (indicating), it's
15 clearly different. But that's not what consumers tend to
16 see. They just tend to be looking at the color at the top,
17 and I think from that perspective it probably could be
18 confusing.
19 Q. They are a different color, right?
20 A. They are a different color, except that, you know, I
21 am the marketer, so I know the PMS color of this. The
22 average consumer just knows yellow.
23 Q. I will go ahead and hand you another packet.
24 MR. LoCASCIO: To the extent I think this is on
25 our exhibit list. If it is not, your Honor, we will

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Debra Sandler - Cross (LoCascio)

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1 certainly mark it, as a housekeeping matter.
 2 **BY MR. LoCASCIO:**
 3 Q. This is a Sugar Twin packet, Miss Sandler.
 4 A. Yes.
 5 Q. Have you seen that before?
 6 A. Yes, I have.
 7 Q. It is also a yellow packet.
 8 A. Yes, it is.
 9 Q. It was on the market before your yellow packet.
 10 A. It was not in food service.
 11 Q. Never been in food service.
 12 A. I won't say never been in food service, but very, very
 13 low distribution in food service. Again, not known by
 14 consumers as the yellow packet.
 15 Q. But you are not saying you are the only one that can
 16 make a yellow packet, are you?
 17 A. No.
 18 Q. You used the phrase before, when you came to the
 19 marketplace, Sugar Twin didn't own yellow. Do you believe
 20 you own yellow today at McNeil?
 21 A. Actually, yes, I do.
 22 Q. So is it --
 23 A. I think the survey that we shared where roughly
 24 70 percent or more of our consumers, of our users would tell
 25 you that that is the first thing that they associate with

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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1 the brand, suggests that I do own yellow.
 2 Q. A couple of questions about that.
 3 First of all, that's the survey you are talking about
 4 where you guys -- you and Mr. Zalesin talked about, which
 5 was the questionnaire that got sent to people in the United
 6 States.
 7 A. Right, that's the consumer segmentation study.
 8 Q. Okay.
 9 And in that consumer segmentation study, people
 10 identified that Splenda had a yellow package.
 11 A. That's correct.
 12 Q. It didn't say whether they were talking about the
 13 packet or the box. It wasn't clear, was it?
 14 A. No. It was simply what color do you associate with
 15 the brand. We did the same thing for, you know, who do you
 16 think of as blue and who do you think of as pink.
 17 Q. And that consumer segmentation study, that doesn't
 18 show anyone what the box looks like, right?
 19 A. No. It just has, I think --
 20 Q. A logo at the top, maybe?
 21 A. Yeah.
 22 Q. Okay.
 23 And it doesn't -- so it doesn't have the trade dress
 24 in this case. It just has the question "comes in a yellow
 25 package."

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Debra Sandler - Cross (LoCascio)

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1 A. Yes.
 2 Q. Let me look back at that study a little bit more.
 3 A. Surely.
 4 Q. I've got it here, and let me see if I can steer you to
 5 where I need for you to look at.
 6 Before you showed -- this is Exhibit 18.
 7 A. Uh-huh. This is the questionnaire.
 8 Q. This is actually the answers first. Let's look at the
 9 survey data in Exhibit 18, page 2 --
 10 A. Hold on.
 11 Q. Sure.
 12 A. Got it. Yes.
 13 Q. What we looked at before, this question, "Comes in a
 14 yellow package," and then you said that 60 percent of people
 15 recognized that Splenda came in a yellow package, correct?
 16 A. That's correct.
 17 Q. The question is not what is the only product that
 18 comes in a yellow package. The question is, do you know
 19 what color Splenda comes in, right?
 20 A. I have to go back to the question. I think the
 21 question --
 22 **MR. ZALESIN:** I object.
 23 I think that's an affirmative misstatement of what the
 24 question is. The question is "comes in a yellow package,"
 25 and they either agree or don't.

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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1 **BY MR. LoCASCIO:**
 2 Q. Let me ask it this way, Miss Sandler. Let me ask it
 3 this way.
 4 This is unaided. You are not asking people cold what
 5 do you know comes in a yellow package. Because there's
 6 choices, correct?
 7 A. There are choices across the top.
 8 Q. That's called an aided study where you say, "Here's
 9 three products. Do any of these come in a yellow package?"
 10 Correct?
 11 A. I'd have to take your definition. That's not my
 12 definition of "aided." But if that's the legal definition,
 13 I would agree with you.
 14 Q. You would agree with me that whatever -- if we are
 15 calling it aided or not, you are giving people a choice of
 16 things, a multiple choice question.
 17 A. Yes. Um-hmm. They have choices of the brand or sugar
 18 at the top, yes.
 19 Q. And in this case they had four choices.
 20 A. Well, actually they had three brands and then one
 21 other category.
 22 Q. When you asked about sugar, you didn't give them a
 23 brand like Domino. You said sugar --
 24 A. Think of whichever your primary brand is.
 25 Q. And your analysis of the data is that 60 percent of

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 people think Splenda comes in a yellow package. Fair?
- 2 A. Sixty percent of the 647 people that said that they
- 3 were aware of Splenda said that it's yellow.
- 4 Q. So you are not asking everyone who knows about
- 5 sweeteners or everyone who buys any sweeteners. You are
- 6 doing this question analysis in terms of what the percentage
- 7 is based on people who already know about Splenda.
- 8 A. Well, let me be clear.
- 9 This study -- this is a representative U.S. sample, so
- 10 it's not only people who are in the category. We then asked
- 11 them, "Are you aware of these brands?" And if they were
- 12 aware of the brand, then we asked them, "What color do you
- 13 associate that with?"
- 14 So we did the same thing with Equal, Splenda and
- 15 Sweet'N Low.
- 16 Q. Miss Sandler, there is a lot more data compiled from
- 17 this study than has been shown so far, right?
- 18 A. Sure. It was a big study.
- 19 Q. And we got a copy of that, and I am going to show you
- 20 another piece of data from that.
- 21 A. Okay.
- 22 Q. I hand you what has been marked as Defendants' Exhibit
- 23 TT.
- 24 There is a lot of data. Do you need glasses,
- 25 Miss Sandler?

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 A. Yes.
- 2 Q. Are they back there?
- 3 A. Yes.
- 4 Q. Let's get those for you.
- 5 A. If you don't mind.
- 6 Q. While you are doing that, do you have a calculator
- 7 back here or anything that can function as a calculator?
- 8 A. No.
- 9 Q. You don't have a palm pilot or anything?
- 10 A. I don't know how to use the calculator function on it.
- 11 Sorry.
- 12 Okay.
- 13 Q. Okay, on the screen I am going to zoom in on parts
- 14 because we can't do the whole thing. You have got the whole
- 15 document.
- 16 On the upper left, this is awareness of sweeteners.
- 17 So this is -- we talked about everyone who was asked the
- 18 study, how many of them knew of a sweetener.
- 19 A. Right.
- 20 Q. Okay?
- 21 We go down the left side and we see that there are
- 22 1228 total respondents. 1228 people were given this version
- 23 of the study.
- 24 A. Right.
- 25 Q. And then we see "net any sweetener." That's number of

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 those 1228 people who knew of a sweetener.
- 2 A. Right.
- 3 Q. So almost everybody.
- 4 A. Yep.
- 5 Q. Pretty close. 1207.
- 6 For Equal -- these are the numbers that were at the
- 7 top of the exhibit you used on direct examination, right?
- 8 A. Okay. Looks like it, yes.
- 9 Q. 1111 Equals --
- 10 A. Yep.
- 11 Q. -- 647 Splendas.
- 12 A. 647, right.
- 13 Q. So of the 1207 people who knew of a sweetener, 647
- 14 knew about Splenda, right?
- 15 A. Correct. Um-hmm.
- 16 Q. So if we go back to the chart you looked at before,
- 17 this data, the yellow package is this one (indicating). If
- 18 you remember -- I can zoom over to the left if you can't see
- 19 it. Do you have it in front of you?
- 20 A. The -- what am I looking at?
- 21 Q. Exhibit 18, page 2.
- 22 A. Yeah. Yeah.
- 23 Q. Sixty percent of the 647 people recognized that
- 24 Splenda comes in a yellow package. Correct?
- 25 A. That's correct.

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 Q. Okay.
- 2 So if we wanted to know how many people, out of the
- 3 people who knew of a sweetener, recognized that Splenda came
- 4 in a yellow package, we'd have to do a little math, right?
- 5 A. That's right. Sixty percent of 647.
- 6 Q. You are two steps ahead and probably three grades in
- 7 math ahead.
- 8 MR. LoCASCIO: May I approach the flip chart, your
- 9 Honor?
- 10 THE COURT: Yes.
- 11 BY MR. LoCASCIO:
- 12 Q. We have Splenda aware, 647, right?
- 13 A. That's correct.
- 14 Q. And that would be the denominator to get to the
- 15 60 percent.
- 16 A. That's correct.
- 17 Q. So up here are number of people who recognize Splenda
- 18 in yellow.
- 19 MR. ZALESIN: Your Honor, may I step here to see?
- 20 Thank you.
- 21 BY MR. LoCASCIO:
- 22 Q. So whatever this number is, this equals 60 percent.
- 23 A. Sixty percent, yes. My calculation is probably about
- 24 400 people.
- 25 Q. I probably should have a calculation, but I can tell

BARBARA DACHMAN, RPR, OCR

Debra Sandler - Cross (LoCascio)

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- 1 you it's 388, a little lower.
 2 A. Okay.
 3 Q. So 388 people recognized that Splenda came in a yellow
 4 package.
 5 A. Um-hmm.
 6 Q. So if you wanted to know the percent of people who
 7 recognized a sweetener -- so you are not counting people
 8 that don't buy sweeteners. You are just counting people who
 9 recognized a sweetener, in your own study, who recognized
 10 Splenda came in a yellow package, you would instead take the
 11 388, Splenda in yellow, and divide by number of people that
 12 recognized a sweetener, right?
 13 A. You could.
 14 Q. Well, that's how you would do it if you wanted to know
 15 what percent of people who knew of a sweetener recognized
 16 Splenda came in yellow.
 17 A. Um-hmm.
 18 Q. These are people in your, as you defined it, market.
 19 A. Right, the 12 --
 20 Q. We looked at it on the sheet I just gave you.
 21 A. The 1111. Oh, no, no, no, that's Equal. The 1207.
 22 Q. Yes, thank you.
 23 And this is the number of people you sent the study to
 24 that are participating in your market of sweeteners.
 25 A. Right.

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Debra Sandler - Cross (LoCascio)

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- 1 Well, yeah. May I say, I won't say it's my market,
 2 but it's the sweetener, because the sugar is included in
 3 there, so...
 4 Q. Okay.
 5 And so that number, if you do the math, I will
 6 represent to you if you don't have a calculator, is
 7 32 percent.
 8 A. From the 30 percent, um-hmm.
 9 Q. So when you testified that 60 percent of people
 10 recognized that Splenda came in a yellow package, those are
 11 the people that responded to the study who had already been
 12 familiar with Splenda. Fair?
 13 A. Yeah.
 14 When I testified earlier, I think I did point out that
 15 it was Splenda aware, the 647 people, in part because
 16 Splenda is still a rela -- we have grown, but still a
 17 relatively new brand on the marketplace, and the other two
 18 brands have been on the marketplace for 50 to 25 years. We
 19 have only been on the marketplace for about four.
 20 Q. So of people who are participating in this market by
 21 knowing or buying sweeteners, 32 percent of them recognized
 22 that Splenda came in a yellow package. Fair?
 23 A. Yeah.
 24 Q. And by recognizing Splenda came in yellow, that's --
 25 let me back up a step.

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- 1 Splenda is in yellow doesn't mean everything yellow is
 2 Splenda, right? It's basic logic. We will put it together
 3 here.
 4 A. Plainly not.
 5 Q. Splenda being in yellow doesn't mean these people said
 6 everything yellow is Splenda, correct?
 7 A. That's correct.
 8 Q. So these people, even these 32 percent of people,
 9 weren't saying "the only product I know in yellow is
 10 Splenda," because that's not the question they were asked.
 11 A. Right.
 12 Q. They were asked does Splenda come in yellow, correct?
 13 A. No, they were not asked does Splenda come in yellow.
 14 Let me be clear. First of all, you have got a lower
 15 level of people who are aware of Splenda. That is by virtue
 16 of the fact that it is the newest product on the
 17 marketplace. Okay? So whereas the other brands are
 18 universally known, Splenda is, as you saw, half the amount
 19 of people are aware of Splenda.
 20 We then asked people if you are aware -- one of the --
 21 because we asked them that for all the brands. So we didn't
 22 go out and say, you know, is Splenda yellow, yes or no.
 23 Q. You gave people a checklist with three brands and a
 24 generic sugar, and you said let us know which one comes in
 25 yellow, or more than one.

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- 1 A. Which one is yellow, which is blue or which is pink,
 2 yeah.
 3 Q. So those people weren't saying, "I think Splenda is
 4 the only one that comes in yellow."
 5 A. No.
 6 Q. They were saying --
 7 A. But they also didn't say that the sugar was yellow or
 8 that the Sweet'N Low was yellow or that the Equal was
 9 yellow.
 10 Q. A couple people did, but not as many as said Splenda.
 11 A. Very small, um-hmm.
 12 Q. The survey or the questionnaire you looked at before
 13 is what people checked the boxes on to get this data, and I
 14 will focus -- I have to zoom in. There are a list of
 15 questions on the left side. You have got the original.
 16 This is Exhibit 46 for the plaintiffs, and we will go down
 17 to the questions and zoom in. But there are the choices on
 18 the top, right?
 19 A. Could you give me a minute to catch up to you?
 20 Q. Sure, sorry.
 21 A. I have it.
 22 Q. Okay.
 23 You've got choices on the top --
 24 A. Yes.
 25 Q. I will zoom in a little bit on that.

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1 And the choices were Equal, Splenda, Sweet'N Low and
 2 the generic sugar.
 3 A. Yes.
 4 Q. And then over here on the left you have got a set of
 5 questions, a whole long list of questions. And you check
 6 off "X" under the product if they believe that was true for
 7 that product.
 8 A. Correct.
 9 Q. And the first question you get to involving color is,
 10 bottom of the first bracket, "Comes in a pink package,"
 11 right?
 12 A. Um-hmm.
 13 Q. So in this market, people, if they are familiar with
 14 comes in a pink package, they move over here and they check
 15 Sweet'N Low, whatever. Whichever the box that matched up,
 16 you would check Sweet'N Low.
 17 A. Yeah, the box that lines up with that question.
 18 Q. Okay.
 19 And so the first thing they see is that "comes in a
 20 pink package," and then they can, if they know, check
 21 Sweet'N Low.
 22 A. Um-hmm.
 23 Q. And if you can look back for me at Exhibit 18 and tell
 24 me how many of the people that were shown this who recognize
 25 those products said they recognized Sweet'N Low came in a

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1 pink package?
 2 A. Hold on.
 3 Q. Sure.
 4 A. This is page -- this is the same --
 5 Q. Page 2 again, I believe.
 6 A. Yep.
 7 Comes in a pink package, 90 percent of the people who
 8 were aware.
 9 Q. And that's 1136.
 10 A. That's correct.
 11 Q. Most of them.
 12 A. Virtually everyone.
 13 Q. So they got to a question that said "does it come in
 14 pink," and then they, most of them, went over and checked
 15 the Sweet'N Low box.
 16 A. Yeah, and as I said, this is the brand that was first
 17 on the market. They have been there for fifty years almost.
 18 Q. So most of the people who got the survey probably got
 19 that one right.
 20 A. Um-hmm.
 21 Q. And then we go down the questionnaire, we go two or
 22 three more brackets -- we haven't gotten to the yellow
 23 question yet -- and we see, top of the fourth bracket,
 24 "Comes in a blue package."
 25 Do you see that?

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1 A. Yes, I do.
 2 Q. And then if you knew Equal came in a blue package, you
 3 went over to the right and you checked Equal.
 4 A. That's correct.
 5 Q. And if we look back at Exhibit 18, the percentage of
 6 people who were familiar with Equal, again, over 1100 that
 7 checked Equal comes in a blue package, is how many percent?
 8 A. Eighty-seven.
 9 Q. So again, most of the people got that one right.
 10 A. Um-hmm.
 11 Q. So as they are going down this questionnaire that you
 12 sent to people, they see a question that says -- well,
 13 there's three brand choices and a generic: Equal, Splenda
 14 and Sweet'N Low, and they get to the first question, "Comes
 15 in a pink package." Most of them check Sweet'N Low.
 16 Then they go further down and "comes in a blue
 17 package." Most of them check Equal.
 18 And then only after they have checked off Sweet'N Low
 19 being pink, checked off Equal being blue, they get to the
 20 question you've talked about, which is, "Comes in a yellow
 21 package." And then for all the people that were taking this
 22 survey because they knew sweeteners, 32 percent of those
 23 people checked Splenda. For people that knew of your
 24 product, you've said of 60 percent checked Splenda.
 25 Did you conduct this study yourself or did you have

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1 somebody else run it for you?
 2 A. As I think I testified earlier, we worked with two
 3 companies: One is called Synovate -- they did a lot of the
 4 actual distribution of the questionnaires -- as well as with
 5 a company called Alcott Group, and they did a lot of the
 6 analysis.
 7 Q. Who prepared the questionnaire?
 8 A. I think it was Alcott Group. Again, I think they did
 9 it together, but I think it was largely the Alcott Group.
 10 Q. And then who sent it out to know, like, okay, this how
 11 many pages, stapled it, and put it in an envelope and sent
 12 it out? Who did that?
 13 A. I believe that was Synovate.
 14 Q. Did you receive one? Were you one of the --
 15 A. No, I don't participate in the surveys that we give to
 16 consumers.
 17 Q. The version we've been looking at -- this is
 18 Plaintiffs' Exhibit 46 -- has the three brand names up at
 19 the top --
 20 A. That's correct.
 21 Q. -- Equal, Splenda and Sweet'N Low, and their logos.
 22 It's not just the word Equal, Sweet'N Low and Splenda.
 23 A. That's right, it's the actual brand logo.
 24 Q. So when we were just talking about this, that's what
 25 you were indicating the survey participants looked at to

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1 figure out which one is blue, which one is pink, which one
2 is yellow.
3 A. That's correct.
4 Q. In the data we got when we exchanged documents from
5 the folks from McNeil -- we have the full version of this.
6 The original document, the electronic version, it's easier
7 to read because it's legal paper -- I guess that's called
8 legal as opposed to letter. This is now Defendants' Exhibit
9 WW --
10 MR. LoCASCIO: Or is it "UU"?
11 BY MR. LoCASCIO:
12 Q. This is the printout of the original version of this
13 study.
14 A. Yes.
15 Q. I'd like for you to turn to page 15. And what I've
16 put on the ELMO --
17 A. Yes.
18 Q. -- is the electronic version of this document.
19 When you open it up on your screen and you print it
20 out --
21 MR. ZALESIN: I have an objection.
22 What are you representing this is? Where did you get
23 this?
24 MR. LoCASCIO: This is from the documents
25 produced.

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1 MR. ZALESIN: What documents produced? There has
2 not been discovery, so what documents produced?
3 I have an objection. I have an objection as to the
4 authenticity of this document. I don't understand where it
5 came from.
6 MR. LoCASCIO: Your Honor, I will explain that
7 when we received the documents Tuesday evening, there was a
8 CD of data that included this original of this study, which
9 is the one that Miss Sandler testified about on direct.
10 THE WITNESS: Except that this is not what
11 consumers received.
12 MR. ZALESIN: If the purpose of the question, your
13 Honor, is to suggest that what the consumer got is a color
14 version of the questionnaire, that is completely incorrect
15 and without foundation.
16 MR. LoCASCIO: The witness can testify to that.
17 MR. ZALESIN: Fine.
18 THE COURT: Well, let's go ahead. Let her answer.
19 BY MR. LoCASCIO:
20 Q. Miss Sandler, a moment ago you said it wasn't sent out
21 by McNeil. Fair?
22 A. That's correct.
23 Q. It wasn't sent out by you.
24 A. That's correct.
25 Q. You can't say for sure right now whether this study

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1 was sent out in color or in black and white, correct?
2 A. That's incorrect. I can say for sure that it was sent
3 out in black and white because I specifically asked the
4 research company before we did the study to make sure that
5 it was not biased, and I specifically asked them yesterday
6 to confirm to me whether it was sent out in color or black
7 and white, and they told me it was done black and white, as
8 was requested.
9 Q. Okay, and that person that sent it out and told you
10 that yesterday when you called --
11 A. She confirmed it yesterday.
12 Q. -- isn't here.
13 A. No.
14 Q. And when you called her, you called because you were
15 concerned why is the original in color.
16 A. No, no, I called to confirm. I called to confirm,
17 because we were going through a number of different things
18 about the study. Because this was done, as I said,
19 September of 2002. I wanted to confirm a number of
20 different things about the study, just to refresh myself
21 about the study and the methodology. That was one of the
22 questions that I asked.
23 Q. Prior to --
24 A. Because you had gotten the electronic version.
25 Q. Prior to yesterday, had you ever asked if a version

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1 was sent out in color or in black and white, or only what
2 you said, "I didn't want it to be biased"?
3 A. Of course. Yes, prior to yesterday I had asked that
4 question before.
5 Q. But you didn't know a minute ago what was sent out
6 when I asked you that question.
7 A. Yes, I did. I told you that these companies were
8 acting on our direction. We specifically -- first of all,
9 you don't send out 1200 color copies. This was sent out in
10 black and white, 2400, in fact; this -- 1200 of this
11 particular one -- and they were sent out in black and white.
12 Q. The original as prepared and disclosed to us in color,
13 correct?
14 A. The one you got was an electronic version, which is
15 very different to an actual printed document which was sent
16 by the research firms in the mail to the consumers.
17 Q. Miss Sandler, listen to my question.
18 The original that was prepared is the version that's
19 the electronic version. That's what was prepared when this
20 was done, correct?
21 A. That's what was prepared, but that is not what was
22 mailed.
23 Q. And the version prepared --
24 A. And that's because we live in an electronic age. I'm
25 sorry; I was just trying to explain what I was saying.

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1 We are living in an electronic age, so copies were
 2 exchanged electronically. But that's not what was actually
 3 physically mailed. I just wanted to clarify.
 4 Q. There is no debating the version that was prepared had
 5 colored logos.
 6 A. The electronic version.
 7 Q. It's true the electronic version had colored logos?
 8 A. Yeah.
 9 Q. If you did send it out with colored logos, that would
 10 be biased, right?
 11 A. Yeah.
 12 Q. Because people would look up and see yellow.
 13 A. Right. I mean, that would defeat the purpose.
 14 Q. Isn't it also biased to ask people, "You have got
 15 three choices." The first question, "Which one comes in
 16 pink? Check a box." The next question, "Which ones comes
 17 in blue? Check a box." And then you got one product name
 18 left and one color left, "Which one comes in yellow?"
 19 Do you think it would have been more representative or
 20 potentially less biased to have those questions in a random
 21 order, some with yellow first, some with blue first, some
 22 with pink first? That would be a better technique. Fair?
 23 A. I guess you could say that. I mean, as you saw, it
 24 was a very large study. We tried to get past some of that
 25 by distributing two sets of questionnaires. You can't

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1 randomize every single thing.
 2 But to be clear, consumers actually had two other
 3 choices. They could identify sugar or they could identify
 4 Splenda, I guess, if they were keeping track of what they
 5 had in fact identified.
 6 Q. If the consumer had gotten to the yellow question and
 7 they were going to check one that they hadn't checked
 8 before, 50-50 chance they'd hit Splenda.
 9 A. Um-hmm.
 10 Q. Same with sugar.
 11 Let me back up. Some of this -- I remember on
 12 direct --
 13 A. I assume you are talking about the yellow. It does
 14 say "Same with sugar" on it.
 15 Q. You seem unclear. It does say "with sugar" on the
 16 box, right?
 17 A. Yeah, I thought you were referring to something else.
 18 Okay, this is the yellow box.
 19 Q. You have several times said, well, there is the
 20 version in the blue package and then they repackaged it in
 21 yellow. That's not true.
 22 A. No, it's a different ingredient.
 23 Q. It's a different product.
 24 A. Yes. It's the same trademark, as you have mentioned,
 25 well known in this market, but they are different

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1 ingredients in the yellow.
 2 Q. And the difference in ingredients is that product has
 3 sugar in it.
 4 A. That's correct.
 5 Q. And Splenda has made a significant amount of its
 6 campaign to connect its product with sugar. Fair?
 7 A. "Made from sugar." Very different.
 8 Q. Very different than "made with sugar."
 9 A. Yeah.
 10 Q. You would not say Splenda is made with sugar.
 11 A. No.
 12 Q. Would that be wrong?
 13 A. That's incorrect.
 14 Q. If your ad campaign was sending a message "made with
 15 sugar," that would concern you because that would be false.
 16 A. Yeah, it's made from sugar. That's why we have the
 17 logo, the seal that says "made from sugar, tastes like
 18 sugar."
 19 Q. Miss Sandler, I'll first off congratulate you. You
 20 were in the *Ad Age 50, Marketing 50*, November '03. Do you
 21 remember that?
 22 A. Yes.
 23 Q. It's an award. You have done a good job marketing
 24 your product.
 25 Let me show you something that you are quoted as

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1 saying in *Ad Age*.
 2 **MR. ZALESIN:** Was this disclosed to us?
 3 **MR. LoCASCIO:** I am not moving it in evidence. I
 4 am impeaching the witness, your Honor. I mean, Steve.
 5 **MR. ZALESIN:** Impeaching what? What statement has
 6 she made that you want to challenge?
 7 **MR. LoCASCIO:** Your Honor, may I ask her a
 8 question about a quote she has in an article?
 9 **MR. ZALESIN:** I object, your Honor.
 10 We had an agreement that all documentary evidence to
 11 be used was for any purpose was to be exchanged prior to the
 12 hearing. Ninety-eight percent of that was exchanged at the
 13 end of the day Tuesday. We each had a couple of exhibits
 14 that we exchanged yesterday by agreement, but we have never
 15 seen this before.
 16 I think if he wants to impeach her, literally impeach
 17 her, that she just testified to one thing and now she's
 18 going to say something else, that's one thing. But I don't
 19 think we are at a stage where he's about to impeach
 20 something she has previously said.
 21 This should have been disclosed.
 22 **MR. LoCASCIO:** Your Honor, the agreement was
 23 evidence that was to be relied upon was to be disclosed.
 24 When we prepared Miss Sandler's cross, we looked at
 25 information Miss Sandler has said. It is exactly contrary

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